IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-719

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

—v.—

HOUSTON WELFARE RIGHTS ORGANIZATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

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Opinion Below

The decision of the Court of Appeals which is set out in the Appendix to the Petition for a Writ of Certiorari has now been reported at 555 F.2d 1219 (5th Cir. 1977).

Additional Regulations Involved

1. Petitioner excerpted a portion of 45 C.F.R. §233.90(a) (1976) in its brief. That regulation, and 45 C.F.R. §233.20 (a)(2)(viii), were amended in 1977 to implement this

Court's decision in *Van Lare* v. *Hurley*, 421 U.S. 338 (1975) in 42 Fed. Reg. 6584 (Feb. 3, 1977) and now provide:

45 C.F.R. § 233.20 Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

• • • • •

(2) Standards of assistance. • • •

• • • • •

(viii) Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.

• • • • •

§ 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

2. The State regulations in effect in 1971 and 1972 which are at issue in this case were contained in Texas Department of Public Welfare Financial Services Handbook, Revision No. 23:

"When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility chart figure, provided the non-dependent relative does not meet this expense for him." § 3122, ¶ 5.

"When non-dependent relatives live with the applicant in his shelter, the applicant's prorata share(s) of the shelter expenses [within the group maximum] shall be

an allowable expense, providing the non-dependent relatives do not meet this expense for him." § 3122.2, ¶ 5.

Questions Presented

1. Did the district court have jurisdiction without regard to the amount in controversy under 28 U.S.C. §§ 1343(3) or 1343(4) to decide whether Texas welfare regulations conflict with federal requirements imposed on the states by the Social Security Act and the Supremacy Clause of the United States Constitution?

2. May Texas' current needs standards, which are required by section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), to reflect fully the extent to which the state's actual benefits are meeting the 1969 needs levels identified by the state be based in part on 1969 shelter and utilities allowances which did not reflect full shelter and utility needs because they had been unlawfully reduced by prorating?

Statement of the Case

Respondents brought this case in March 1973 to challenge the validity of new needs standards adopted on March 1, 1973 by the State of Texas for its Aid to Families with Dependent Children (AFDC) program. As the result of the changes made by Texas, 228,584 families in Texas, including two of the respondents' families, suffered reductions in cash assistance, while 2,747 families including one

[1] Defendants' Answer to Interrogatory No. 7, p. 3, Record in Court of Appeals, R. 75. Respondents Phoenix's and Ortega's grants

respondent family lost eligibility for cash assistance, and therefore medical assistance, altogether.[1] Since benefits in Texas were clearly among the lowest in the country in any event, respondents were severely harmed by these changes.[2]

The needs standards used by Texas until March 1973 consisted of several components, an allowance for personal needs for each individual,[3] a shelter allowance,[4] a utility

were reduced from $148 to $140, and $89 to $86, respectively, and respondent Stafford and her grandchild lost eligibility altogether. App. 9-11. Medical benefits under the Texas federal-state medical assistance program are provided only to individuals eligible to receive cash assistance, and certain other small groups not relevant herein. Section 1902(a)(10) of the Social Security Act, 42 U.S.C. §1396a(a)(10); Vernon's Ann. Texas Stat., Art. 695j-1 (Supp. 1978); Texas Dept. of Human Resources AFDC Handbook §4100 (June 1976). Such benefits are worth approximately $30 per person per month. HEW, HCFA Office of Research, Report B-1, Table 3, p. 9 (July 1977); HEW, SSA Office of Research, Public Assistance Statistics, Report A-2, Table 4 (July 1970).

[2] In 1969 the actual Texas benefit, which was below the standard as will be explained *infra*, was the 44th lowest benefit for an AFDC family of two and 45th for an AFDC family of four. Texas has not increased AFDC benefits since then. In 1973, when this suit was filed, Texas provided the 45th lowest benefit to AFDC families of two and of four in 1973. By 1977 it had sunk to the 49th lowest benefit to an AFDC family of two and the 48th lowest benefit to an AFDC family of four. HEW National Center of Social Statistics Report D-2, July 1969, Tables 3, 4; July 1973, Tables 5, 6; July 1977, Tables 2, 4. (While AFDC recipients are also entitled to food stamps, those limited additional benefits do not improve their comparative standing with the rest of the country.)

[3] $65 for each adult, $25 for each child under 18 years of age, and $39 for each child 18-21 years of age and in school. App. A-8.

[4] For private housing, actual cost up to a maximum of $33 for a family of one or two, $44 for a family of three or four, and $50 for a family of five or more; for public housing, $36 for a family of one, $42 for a family of two to four, and $50 for a family of five or more. App. A-8. These ceilings were well below the average rents being paid by families, App. A-43-44.

allowance,[5] and certain special needs allowances, that were added together to provide a standard for each family. This standard was then reduced by a 75% percentage reduction factor, and any outside countable income was then subtracted from the reduced standard in order to determine the amount of the benefit. These standards had been set in 1969 and reflected an 11% cost of living increase over the prior standards, as required by section 402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23).

Prior to 1973, Texas prorated AFDC payments. The shelter and utilities standards were reduced before the 75% factor was applied if there was a relative who was not eligible for AFDC benefits living with the AFDC family. The amount added for shelter in these cases was determined by first considering the lower of the actual rent, or the maximum shelter allowance, for the entire household including the ineligible relative, and then by dividing that lower amount by the number of people in the household and assigning a pro rata shelter allowance to each individual in the household. The shelter allowance for the AFDC family was then computed by adding together the pro rata shares of the AFDC recipients.

The effect of this policy can be seen in respondent Ortega's case. Paula Ortega and her 11 year old son Reymundo received AFDC benefits. Paula's disabled sister, Maria San Juana, also lived with the family and received public assistance under the then-existing federal-state Aid to the Disabled program, Title XIV of the Social Security Act, 42 U.S.C. §1351ff, repealed 86 Stat. 1484. Paula's destitute mother also resided with the family. The family had no income other than public assistance.

[5] The utility allowance was a flat $13 per family.

The actual shelter cost for the whole household was $51.33. Texas' maximum shelter allowance was $33 for a two-person household and $44 for a four-person household. If the family had consisted of four AFDC recipients with no other income, its shelter allowance would have been $44. If the family had consisted of two AFDC recipients without other income living alone, its shelter allowance would have been $33. The standard for Paula Ortega and her child, however, was only $22, or two-fourths of the four-person standard. The sister who was receiving Aid to the Disabled had a standard of $11, one-fourth of the four-person standard. After the 75% reduction, the family actually received $24.75 toward its actual shelter cost of $51.33. App. A-6. Texas also prorated the maximum $13 allowance for utilities among the total number of persons in the household, so that Paula Ortega and her child had a standard of $6.50 instead of $13, and her sister had a standard of $3.25.

In 1973 Texas moved from the use of individualized needs standards to simpler consolidated standards which were derived by averaging the actual needs standards of the entire caseload during selected months of the prior year to produce an amount which constituted the needs standard for all families of that size.[6] Texas engaged in averaging in order to comply with section 402(a)(23) of the Social

[6] The new monthly standards were:

Family size	1	2	3	4	5	6	7	8	9	10
Caretaker not included	$32	$ 62	$ 90	$118	$146	$174	$202	$230	$258	$286
Caretaker included	$ 0	$115	$155	$187	$218	$246	$273	$300	$326	$353

App. A-9. These standards were reduced by the 75% factor before benefits were determined.

Security Act, 42 U.S.C. §602(a)(23), which required states to increase their standards of need by July 1, 1969 to fully reflect changes in the cost of living and to maintain these current standards thereafter. This Court had held that states could consolidate standards but could not thereby effect a reduction or an obscuring of the full 1969 standards. *Rosado* v. *Wyman*, 397 U.S. 397, 412-15 (1970).

The Texas prorating policy was not directly applied to any families after the new consolidated standards took effect on March 1, 1973.[7] Nonetheless, the new consolidated standards for all families were lower than they would have been if there had been no prorating policy prior to 1973 because they were based on an average that included reduced prorated shelter and utility allowances.

The inclusion of prorated allowances in the averaging had a particularly adverse effect on small families. App. A-37, 38. Indeed, even the Ortega family, no longer subject to prorating of its shelter and utility allowances, found its grant after March 1, 1973 reduced by $3 compared to the amount which they had been receiving under the prorated standards.[8] All in all, the inclusion of prorated allowances in the averages on which the 1973 consolidated standards were based resulted in expenditures 7% (or, at the current

[7] Texas states that "before and after the March 1 consolidation Texas pro-rated a recipient's shelter or utility expenses in calculating the standard of need if one or more non-eligible individual(s) resided with the recipient." Petitioners' Brief at 6. Since such calculations were no longer made in the individual case after March 1, Texas must be referring to the lowering of the consolidated standard by the inclusion of prorated standards in the average. See also the opinion of the Court of Appeals below, App. to Petition for Writ of Certiorari, B-33.

[8] The effect of the change in computation for the Ortega family is as follows (App. A-11):

time, some $9 million dollars) less than they would have been had such prorated allowances not been included. Texas Dept. of Human Resources, Proposed 1979-81 Budget Issues, p. 15. Texas therefore became one of those states that did not have to "face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need" as required by section 402(a)(23). *Rosado* v. *Wyman*, *supra*, 397 U.S. at 412-13.

On March 7, 1973 respondents filed suit to set aside the new consolidated standards. While respondents raised a number of challenges to the computation of the new standards under the governing Social Security Act, no constitutional claims were made in the original complaint.[9] Juris-

Before March 1, 1973		*After March 1, 1973*	
Personal needs:			
$65 × 1 adult = $65			
$25 × 1 child = $25			
½ of $44 housing allowance for 4 persons in private housing	= $22		
½ of $13 utility allowance	= $ 6.5	Single figure needs allowance for caretaker family of two	$115
Special needs	= $ 0		
Total needs	$118.5		$115
Recognized needs (75%)	$ 88.88		$ 86
Minus income	$ 0		$ 0
Actual AFDC grant	$ 89		$ 86

[9] As discussed more fully in note 46 *infra*, the respondents attempted to amend their complaint to raise a constitutional claim by motions after the district court issued its memorandum and opinion and then after final judgment was entered. App. A-15, A-16. The district court denied both motions. Respondents challenged the district court's denial of the motions in their Notice of Appeal to the Fifth Circuit, but the Fifth Circuit did not have to reach this issue.

diction was alleged under 28 U.S.C. §§1337 and 1343(3) and (4). On cross motions for summary judgment, the District Court found jurisdiction under section 1343(4). On the issue before this Court on the merits, the validity of using prorated standards in developing the consolidated standards, the District Court sustained the prorating policy, relying primarily on the Second Circuit decision in *Taylor* v. *Lavine*, 497 F.2d 1208 (1974). The Court of Appeals affirmed the District Court's ruling on jurisdiction and reversed on the merits, finding that *Van Lare* v. *Hurley*, *supra*, reversed *Taylor* and was controlling, and held that Texas therefore must recompute its standards based upon the 1969 standards which complied with the requirements of the Social Security Act.

SUMMARY OF ARGUMENT

I.

Respondents in this case challenge Texas welfare regulations on the ground that they conflict with federal requirements imposed by the Social Security Act. The case involves important issues of federal policy as well as the allocation of millions of dollars of federal aid. The district court had jurisdiction over respondents' claims under three separate heads of federal jurisdiction.

First, it is firmly established that challenges to state welfare rules on the ground that they conflict with the Social Security Act rest on the Supremacy Clause of the United States Constitution. Article VI, cl. 2. Respondents therefore stated a claim for relief under 42 U.S.C. § 1983, which since its enactment in 1871 has provided a cause of

action to redress violations of "rights, privileges and immunities secured by the Constitution." Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13. The district court had jurisdiction to hear this Supremacy claim under 28 U.S.C. § 1343(3), which reaches any action authorized by section 1983 to redress the violation of Constitutional rights.

The language of section 1983 is extremely broad and admits of no exception for rights secured by the Supremacy Clause. Nearly identical language in related civil rights statutes has been construed by this Court as reaching rights protected by *all* parts of the Constitution. Furthermore, a major purpose of section 1983 and the other civil rights laws and Amendments adopted by the Reconstruction Congress was to reaffirm the Supremacy of federal law, which had been questioned by pro-slavery forces in the years prior to and during the Civil War. Since Congress took a number of steps to protect the enforcement of federal laws in other sections of the 1871 Civil Rights Act and in other contemporaneous civil rights laws, it cannot reasonably be claimed that Supremacy claims are excluded from section 1983.

Second, respondents' contention that the Texas regulations violate the Social Security Act may also be brought under that portion of section 1983 which provides a cause of action to redress violations under color of state law of "rights secured by the . . . laws" of the United States. This language was added to the statute in the Revised Statutes adopted by Congress in 1875 and is therefore positive law. This Court has previously made clear that it applies to all federal statutes including the Social Security Act.

Unlike where Constitutional claims are involved, 28 U.S.C. § 1343(3) does not on its face parallel section 1983.

Rather, section 1343(3) provides federal court jurisdiction over actions authorized by law to redress violations of rights secured by the Constitution or by "any Act of Congress providing for equal rights." However, the history of the two sections makes clear that they were intended to be complementary and that section 1983 is itself an Act of Congress providing for equal rights. Hence, jurisdiction over section 1983 statutory claims also exists under section 1343(3).

Third, the district court had jurisdiction over both the Supremacy and statutory claims brought under section 1983 under 28 U.S.C. § 1343(4), which provides jurisdiction for any action authorized by law under "any Act of Congress providing for the protection of civil rights." This Court has made clear that the purpose of section 1983 is to *protect* federally created rights by providing a cause of action in federal court for their enforcement and that the rights protected by section 1983 are *civil rights. Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), held that claims under 42 U.S.C. § 1982 may be brought under section 1343 (4). Since section 1983 was modeled after the criminal analogue to section 1982, and section 1983 was intended to protect many of the civil rights covered by section 1982, the two statutes should be treated alike for purposes of jurisdiction under section 1343(4).

It is true that, unlike section 1982, section 1983 does not define for itself the substantive rights that fall within its protection. But this is irrelevant, since section 1343(4) applies to Acts that *protect* civil rights, not to Acts that *create* rights. Furthermore, other provisions of the Civil Rights Act of 1957 demonstrate that Congress was unconcerned with the distinction between laws that create rights

and laws that protect civil rights created by the Constitution and other federal laws. In addition, it is consistent with the purpose of the 1957 Civil Rights Act to construe section 1343(4) as curing any possible limitations on civil rights jurisdiction under section 1343(3).

Finally, strong policy arguments support the construction of sections 1343(3) and (4) urged by respondents. The issues in this and similar welfare cases are especially suited for decision by the federal courts. They often involve social policies to which state courts may be hostile, and the federal statutory scheme is often extremely complex. Moreover, the determination of the proper allocation of federal aid in the welfare area is especially suited for the federal courts.

If federal courts cannot hear federal welfare claims, there may be no forum at all for their vindication. Some states prohibit any review of welfare department actions, while others so encumber such review or limit the available relief as to make redress virtually unavailable. Finally, respondents' position here would not add significantly to the caseload of the federal courts and would save considerable time now spent on deciding needlessly complex jurisdictional issues in cases where the underlying federal statutory claims are clear.

II.

On the merits, respondents claim that Texas has reduced its AFDC needs standards in violation of section 402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23), under which Congress has provided that states must have increased their AFDC needs standards by July 1, 1969, to reflect fully changes in costs until that time. This Court has held that states may not thereafter reduce their standards below that 1969 level. States may consolidate their standards by averaging prior standards, however, provided that the new standards give full recognition to all components of the prior standards and do not obscure the extent to which actual benefits in the state fail to meet the needs recognized in the state's 1969 levels. *Rosado* v. *Wyman, supra.*

Texas has engaged in such a consolidation of its 1969 standards. Among the 1969 standards which Texas averaged to obtain the consolidated standard were shelter and utilities allowances that had been unlawfully reduced by "prorating," that is, by improperly assuming that nonrecipients living with the family were contributing to the family, in violation of the Social Security Act and federal regulations. *Van Lare* v. *Hurley, supra.* Since such standards had been reduced in violation of the Social Security Act and did not accurately reflect the needs of the families involved, their inclusion in the average resulted in lower standards for all recipients, thereby obscuring the extent to which Texas continues to fall short of meeting its 1969 needs standards. The Texas standards should therefore be increased to reflect the full lawful 1969 needs standards.

ARGUMENT

I. The District Court had jurisdiction over this action without regard to the amount in controversy under 28 U.S.C. §§ 1343(3) and 1343(4).

Respondents in this case challenge statewide welfare regulations issued by the Texas Department of Human Resources on the ground that the regulations conflict with federal requirements contained in the Social Security Act. The case involves important issues of federal welfare policy as well as the proper allocation of millions of dollars of federal aid. The jurisdictional question presented here, and in *Gonzalez* v. *Young,* No. 77-5324 (1977 Term), is whether challenges to state welfare rules that conflict with federal law may be heard by the federal courts or whether they must be decided, if at all, in the state courts.

Respondents submit that the district court had jurisdiction under three separate heads of federal jurisdiction. First, this action was authorized by 42 U.S.C. § 1983 since respondents seek to enforce rights secured by the Supremacy Clause of the United States Constitution. Jurisdiction therefore existed over these Supremacy claims under 28 U.S.C. § 1343(3). Second, apart from the Supremacy Clause, section 1983 authorizes actions to redress the violation of all federal "laws", including the Social Security Act. Since section 1983 is an "Act of Congress providing for equal rights" within the meaning of section 1343(3) such statutory actions may also be brought under that provision. Third, respondents' Supremacy and statutory claims under section 1983 may be brought under 28 U.S.C. § 1343(4) because section 1983 is an "Act of Congress providing for

the protection of civil rights" within the meaning of that statute.

A. *This Action Is Authorized by 42 U.S.C. §1983 Since Respondents Seek to Enforce Rights Secured by the Supremacy Clause of the United States Constitution; Jurisdiction Over This Action Therefore Exists Under 28 U.S.C. §1343(3).*[10]

Since its enactment in 1871, section 1983 has provided a cause of action to redress violations of all "rights, privileges, and immunities secured by the Constitution." Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13. It is firmly established that challenges to state welfare rules on the ground that they conflict with the Social Security Act rest on the Supremacy Clause of the Constitution. U.S. Const. art. VI, cl. 2. *Hagans* v. *Lavine,* 415 U.S. 528, 533 n. 5, 550, 552-53 (1974); *Carleson* v. *Remillard,* 406 U.S. 598, 601 (1972); *Townsend* v. *Swank,* 404 U.S. 282, 286 (1971). Since Supremacy claims are "basically constitutional in nature," *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 272 (1977), federal statutory rights guaranteed by the Supremacy Clause are "secured by" the Constitution within the meaning of section 1983, and jurisdiction over such Supremacy claims exists under 28 U.S.C. § 1343(3).[11]

[10] The Petition for Writ of Certiorari raised only the issue of whether 28 U.S.C. § 1343(4) confers subject matter jurisdiction over respondents' claims. Respondents' Opposition to Petition for Writ of Certiorari, however, asserted that 28 U.S.C. § 1343(3) also provides subject matter jurisdiction in this case. Consequently, this argument is properly before the Court. *Story Parchment Co.* v. *Paterson Parchment Co.,* 282 U.S. 555, 560 (1931); *Langnes* v. *Green,* 282 U.S. 531, 535-39 (1931); *United States* v. *American Railway Express Co.,* 265 U.S. 425, 535-36 (1924). *Compare Wiener* v. *United States,* 359 U.S. 349, 351 n. (1958).

[11] 28 U.S.C. § 1343(3) provides original jurisdiction in federal district court for any civil action "authorized by law . . . [t]o redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States. . . ." Since the language of both statutes is the same, and both originated in section 1 of the 1871 Civil Rights Act, jurisdiction exists under section 1343(3) for any action authorized by section 1983 to redress Constitutional rights. *Aldinger* v. *Howard,* 427 U.S. 1, 17 (1976); *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 543 n. 7 (1972).

The language of section 1983 is unambiguous and admits of no exception. Like the virtually identical language in 18 U.S.C. § 241,[12] it "embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution. . . ." *United States* v. *Price,* 383 U.S. 787, 800 (1966), (emphasis in original); *see also, United States* v. *Guest,* 383 U.S. 745, 753 (1966); *United States* v. *Classic,* 313 U.S. 299, 321-22 (1941).[13] This Court has previously rejected any effort to

[12] Section 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . they shall be fined not more than $5000 or imprisoned not more than ten years, or both.

[13] Although section 1983 is most often relied on to vindicate rights under the Fourteenth Amendment, it is not limited to such rights. *Bailey* v. *Patterson,* 369 U.S. 31 (1962); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *cf. Carter* v. *Greenhow,* 114 U.S. 317 (1884). In *Bailey,* the Court upheld an action under section 1983 to enforce the right guaranteed by the Commerce Clause to non-segregated service in interstate and intrastate transportation. 369 U.S. at 32-33. *See Morgan* v. *Virginia,* 328 U.S. 373 (1946). In *Smith* v. *Allwright,* the Court upheld an action under section 1983 to redress violations of the Fifteenth Amendment. *See also, Cobb* v. *City of Malden,* 202 F.2d 701 (1st Cir. 1953) (action to enjoin state impairment of contracts); *Valle* v. *Stengle,* 176 F.2d 697 (3d Cir. 1949) (action to redress privileges and immunities guaranteed by U. S. Const. art. IV, § 2, cl. 1); *Raymond Motor Transp., Inc.* v. *Rice,* 417 F. Supp. 1352, 1354 (W.D. Wis. 1976) (action to enjoin state trucking laws in violation of Commerce Clause); *Moity* v. *Louisiana State Bar Assn.,* 414 F. Supp. 176 (E.D. La.) (three

"pare down" the scope of the Constitutional rights and privileges that fall within its protection. *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 549.

Section 1983 was one of the five civil rights bills enacted by the Reconstruction Congress. One of the major goals of that body of legislation and the Constitutional Amendments on which it was based was to establish the federal government as the primary guarantor of basic federal rights. *Mitchum* v. *Foster,* 407 U.S. 225, 239 (1972). To this end, it was essential to reaffirm the primacy of federal law established in the original Constitution by the Supremacy Clause, but seriously weakened in the years prior to the Civil War.[14] Commager, *Historical Background of the Fourteenth Amendment,* in The Fourteenth Amendment 25-27 (B. Schwartz ed. 1970).

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judge court), *dismissed on remand,* 414 F. Supp. 180 (E.D. La.), *aff'd,* 537 F.2d 1141 (5th Cir. 1976) (action to enjoin ex post facto law).

18 U.S.C. §§ 241-242, which provide criminal penalties for the violation of Constitutional rights, have also been construed to apply to non-Fourteenth Amendment rights. *United States* v. *Guest, supra,* 383 U.S. at 759 n. 17 (right to travel not encompassed within the Fourteenth Amendment); *United States* v. *Classic, supra* (right to vote protected by U. S. Const. art. I, § 2).

Although *Carter* v. *Greenhow, supra,* appears to hold that rights secured by the impairment of contract clause are not protected by section 1983, the decision rests upon the now discredited distinction between property and personal rights. *See Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 542 n. 6.

[14] During that period, pro-slavery forces had argued that the states remained "sovereign" after the ratification of the Constitution, and that they could consequently nullify actions of the national government which they believed to be unconstitutional. *E.g.* Calhoun, *A Discourse on the Constitution and Government of the United States,* in 1 The Works of John C. Calhoun (1888); *see also,* W. Bennett, *American Theories of Federalism* 100-59 (1964); 1 Mogi, The Problem of Federalism 105-17 (1931).

A major purpose of the Fourteenth Amendment[15] and the civil rights laws passed to enforce it was to affirm the Supremacy of federal law. Thus, in one of the first cases construing the Fourteenth Amendment, this Court made clear that as a result of the Amendment no state could "deny to the general government the right to exercise all of its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted." *Ex Parte Virginia,* 100 U.S. 339, 346 (1880). And in the *Slaughter-House Cases,* 16 Wall. 36 (1872), the Court held that the privileges and immunities clause of the Fourteenth Amendment protected from state interference the basic rights of national citizenship "which owe their existence to the Federal government, its national character, its Constitution, or its laws."[16] 16 Wall. at 79. As Mr. Justice Jackson wrote concurring in *Edwards* v.

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[15] The first version of the Fourteenth Amendment introduced in the Thirty-Ninth Congress provided: "All national and state laws shall be equally applicable to every citizen and no discrimination shall be made on account of race or color." Flack, *Adoption of the Fourteenth Amendment* 56 (1908).

[16] In his majority opinion in the *Slaughter-House Cases,* Mr. Justice Miller held that the privileges and immunities protected from state interference by the Fourteenth Amendment include a citizen's right "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions." 16 Wall. at 79. Subsequent cases have recognized that the privileges and immunities protected by the Amendment derive from the right of the national government to legislate without interference in all areas granted to it under the Constitution. Thus, *United States* v. *Cruikshank,* 92 U.S. 542 (1875), held that the right to petition the federal government for redress of grievances is a privilege of national citizenship, and *In Re Quarles,* 158 U.S. 532 (1895), held the right to inform the government about violations of its statutes to be similarly protected. In his opinion in *Hague* v. *C.I.O.,* 307 U.S. 496, 513 (1939), Mr. Justice Roberts included as a protected privilege the right to assemble "to discuss national

California, 314 U.S. 160, 182 (1941), "[t]his clause was adopted to make United States citizenship the dominant and permanent allegiance among us."

The Civil Rights Act of 1871, which was enacted to enforce the provisions of the Fourteenth Amendment, 17 Stat. 13, similarly was intended to protect the Supremacy of federal law.[17] Thus, the message from President Grant to Congress on March 23, 1871, which led to the passage of the

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legislation and the benefits, advantages and opportunities to accrue to citizens therefrom."

In his dissenting opinion in the *Slaughter-House Cases*, Mr. Justice Field specifically noted the overlap between the privileges and immunities clause, as construed by the majority, and the Supremacy Clause: "With privileges and immunities thus designated no state could ever have interfered by its laws. . . . The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character." 16 Wall. at 96.

[17] One of Congress' major concerns during the post-Civil War period was interference with the operations of the Freedman's Bureau. The First Freedman's Act, adopted in 1865, had provided *inter alia* for the issuance of "such provisions, clothing and fuel, as [are] needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children." Act of March 3, 1865, ch. 90, 13 Stat. 508. The Act also authorized the setting aside and granting of land to each refugee or freedman. *Id.* The Second Act, adopted in 1866, continued the Bureau for two additional years and extended its supervision and care "to all loyal refugees and freedmen, so far as the same shall be necessary to enable them as speedily as practicable to become self-supporting citizens of the United States. . . ." Act of July 16, 1866, ch. 200, 14 Stat. 174. The life of the Bureau was extended again in 1868 and its activities finally came to an end in the summer of 1872. Konvitz, *A Century of Civil Rights* 43-47 (1961).

In its report supporting adoption of the Fourteenth Amendment, the Joint Committee on Reconstruction cited the fact that the Bureau "is almost universally opposed by the mass of the population, and exists in an efficient condition only under military protection." Report of the Joint Committee on Reconstruction reprinted in Schwartz, *Statutory History of the United States: Civil Rights*, pt. 1, pp. 285, 288 (1970). The Civil Rights Act of 1866 had provided removal jurisdiction in the federal courts to

Act, urged legislation to secure "the enforcement of law in all parts of the United States." *Monroe* v. *Pape*, 365 U.S. 167, 172-73 (1961). To this end, section 2 of the Act expressly prohibited conspiracies "to prevent, hinder, or delay the execution of any law of the United States," and to interfere with federal officers in the discharge of their duties. 17 Stat. 13. Section 3 authorized the President to take necessary measures, including use of the military, to resist violence, conspiracies or insurrection that obstructed or hindered the execution of federal laws. 17 Stat. 14.

Finally, section 6 of the Civil Rights Act of 1870, Act of May 31, 1870, ch. 114, 16 Stat. 140, now 18 U.S.C. § 241, prohibited conspiracies "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right, or privilege granted or secured to him by the Constitution or laws of the United States." 16 Stat. 141. This Court very early held that section 6 protects the right to settle on public lands established by the Homestead Acts. *United States* v. *Waddell*, 112 U.S. 76 (1884).

In light of the overall purpose of the Reconstruction legislation to establish the federal government as the primary guarantor of federal rights, and the protection of rights under federal laws afforded in other sections of the 1871 Act and in the 1870 and 1866 Acts, it is clear that Supremacy claims must have been included under section 1983. The states[18] nevertheless advance three arguments to support such an exclusion.

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protect federal officers and other individuals from actions taken pursuant to the Freedmen's Bureau Act. Act of April 9, 1866, ch. 31, 14 Stat. 27.

[18] Because the jurisdictional issues are the same in both cases, respondents address the arguments against jurisdiction raised by

First, the states argue that a case is constitutionally-based for purposes of section 1983 only when a correct decision depends upon a construction of the Constitution, which is said not to be the case here. The cases offered by the states to support this argument, however, all involved whether a claim *arises under* federal law for purposes of establishing the power of a federal court to decide a case under Article III, § 2 of the Constitution and 28 U.S.C. § 1331,[19] which power surely exists here. Those cases have no relevance to the wholly different question of whether a right is *secured by* the Constitution so as to state a claim for relief under section 1983. *Cf. Bell* v. *Hood*, 327 U.S. 678 (1946).

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the Texas petitioners in this case and the New Jersey respondents in *Gonzales* v. *Young, supra*, No. 77-5324. For convenience, the arguments of both groups of state officials are referred to in Part I of this brief as the arguments of "the states."

[19] 28 U.S.C. § 1331(a) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . . .

Even as a test for determining federal question jurisdiction, the states' formulation is inaccurate. The fact that application of federal law is not contested in a particular case does not defeat federal jurisdiction. Thus, federal jurisdiction exists where the defendant defaults and controverts nothing, *The Fair* v. *Kohler Die and Specialty Co.*, 228 U.S. 22 (1913), or where the only questions are factual and no issue exists regarding the federal law. *Peyton* v. *Railway Express Agency, Inc.*, 316 U.S. 350, 352-353 (1942); 1 Moore's Federal Practice ¶ 0.62 [2.-2] at 664 (2d ed. 1977). Conversely, the fact that a federal question may be raised in defense of an action does not necessarily mean that federal jurisdiction exists. *Phillips Petroleum Co.* v. *Texaco*, 415 U.S. 125 (1974); *Louisville & Nashville R.R.* v. *Motley*, 211 U.S. 149 (1908).

More importantly, at the heart of every Supremacy case is the question of whether the degree of conflict between federal and state laws violates the Constitution. As this Court stated in *Perez* v. *Campbell*, 402 U.S. 637 (1971):

> Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the *constitutional question* of whether they are in conflict.

402 U.S. at 644 (emphasis added). Even where, as here, the conflict is obvious, the Supremacy question is still Constitutional in nature.

Second, the states assert that the Supremacy Clause merely states a fundamental structural principle of federalism, rather than securing individual rights that may be protected by section 1983. In their view, the individual rights asserted in Supremacy cases are *secured by* the underlying federal statutes and not by the Constitution itself. This argument stretches the statutory language beyond recognition. As Mr. Justice Brennan wrote in an analogous context, "[a] right is 'secured . . . by the Constitution' . . . if it emanates from the Constitution, if it finds its source in the Constitution." *United States* v. *Guest, supra*, 383 U.S. at 779 (Brennan, J. concurring in part and dissenting in part). Similarly, in *Hague* v. *C.I.O., supra*, Mr. Justice Stone stated that the term "secured by" in 18 U.S.C. § 241 refers to all rights *protected by* the Constitution, not simply to those created by it. 307 U.S. at 526-27.

It is clear that Supremacy claims emanate from and are protected by the Constitution even though they depend in part upon Congressional action.[20] Thus, this Court has held that a federal statutory claim "deriv[es] its force" from the Supremacy Clause, *Douglas* v. *Seacoast Products, Inc.*, *supra*, 431 U.S. at 272, and that the Clause "is the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law." *Swift and Co.* v. *Wickham*, 383 U.S. 111, 122 n. 18 (1965).

Finally, the states contend that recognition of Supremacy claims under section 1983 is barred by this Court's decision in *Swift and Co.* v. *Wickham, supra*. *Swift* held that cases involving conflicts between state and federal statutes, although Constitutional in nature, do not require the convening of a three-judge district court under 28 U.S.C. § 2281. The Court's holding was based, however, on the specific language and history of section 2281,[21] as well as on "important considerations of judicial administration," 382 U.S.

[20] It is not essential that a person seeking to enforce the Supremacy Clause assert that his express federal rights have been denied by state law. It is enough that the state law interferes with the federal regulatory scheme. *See, e.g., Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *City of Burbank* v. *Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Furthermore, in cases involving express federal statutory rights, it is as fruitless to argue that the right is secured only by the statute as it is to contend that it derives solely from the Constitution. *Cf. Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

[21] Section 2281 was adopted by Congress in reaction to a number of judicial decisions striking down state social legislation under the due process clause of the Fourteenth Amendment. Since Supremacy Clause claims do not present the same opportunity for judicial obstruction of state laws and decisions based on statutes can be overruled by Congress, the Court concluded that there was no need for three-judge courts in such cases. 382 U.S. at 127.

at 128, which counseled against unnecessarily expanding the jurisdiction of three-judge courts. 382 U.S. at 128-29.[22] None of these factors are present here. *See* Part I, section D *infra*. Indeed, as we have shown, coverage of Supremacy claims under section 1983 is fully consistent with the history and remedial purposes of the Act.[23]

B. *This Action Is Also Authorized by 42 U.S.C. §1983 to Enforce Rights Secured by the Social Security Act; Jurisdiction Over Such Claims Exists Under 28 U.S.C. §1343(3) Because Section 1983 Is an Act of Congress Providing for Equal Rights.*

When Congress revised the federal laws in 1875, section 1 of the 1871 Act was rewritten to protect all "rights, privileges and immunities secured by the Constitution *and laws*." Rev. Stat. § 1979 (1875) (emphasis added).[24] In *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), the phrase

[22] Three-judge courts interfere with the normal structure and functioning of the lower federal courts by requiring judges who often sit in different parts of a state or region to sit together. 382 U.S. at 268. They also expand the obligatory appellate jurisdiction of the Supreme Court in violation of the principle that ordinarily requires two levels of appellate review. *Id.*

[23] Inclusion of Supremacy claims under section 1983 does not mean that a cause of action exists to enforce every federal statutory right. First, where Congress has expressly provided that no private right of action is intended to enforce a statute, the more specific legislation will prevail over the general right contained in section 1983. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973). Second, not all violations of federal statutes under color of state law involve a claim under the Supremacy Clause. For example, a violation of the federal anti-trust or securities laws by a state in carrying out its own proprietary activities certainly does not involve the Supremacy Clause. The Clause is involved, however, wherever a state law, regulation, policy or course of conduct conflicts with federal law. Whether, in addition, actions by individual state welfare officials in contravention of both state and federal laws depend upon the Supremacy Clause need not be decided here. *Cf. Monroe* v. *Pape, supra*.

"and laws" in Rev. Stat. § 1979 was construed by this Court to include not only "civil equal rights laws," but "other federal . . . statutory rights as well."[24a] 384 U.S. at 829-30. And, in *Monell* v. *New York City Dep't of Social Services*, 46 U.S.L.W. 4569, 4581 (U.S. June 6, 1978), this Court stated, "there can be no doubt that § 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." Therefore, apart from the Supremacy Clause, rights created by the Social Security Act are protected by section 1983.[25] *See Edelman* v. *Jordan*,

[24] Since the Revised Statutes were enacted as positive law, Revision of Statutes Act of 1874, ch. 333, § 2, 18 Stat. 113 (1875), the addition of "and laws" to the statute cannot be ignored because it was added by the Revisors. *See Examining Board of Engineers, Architects & Surveyors* v. *De Otero*, 426 U.S. 572 (1976); *United States* v. *Bowen*, 100 U.S. 508, 513 (1879). *Cf. Wynn* v. *Indiana State Dep't. of Public Welfare*, 316 F. Supp. 324 (N.D. Ind. 1970).

[24a] *Holt* v. *Indiana Manufacturing Co.*, 176 U.S. 68 (1900) is not to the contrary. There, the plaintiff sought to enjoin the collection of state taxes assessed against the company's tangible property, including its patent rights, on the ground that the Constitution and federal patent laws prohibited the taxes. The district court dismissed the action, and this Court affirmed, stating simply that sections 1983 and 1343(3) "refer to civil rights only and are inapplicable here." 176 U.S. at 72.

As this Court noted in *Lynch* v. *Household Finance Co.*, *supra*, *Holt* is best understood as falling under the special judicial policies that generally limit federal court interference with state tax laws. 405 U.S. at 542 n. 6. Moreover, since the claims in *Holt* were both statutory and Constitutional, the decision must have been based not on the inapplicability of section 1983 to statutory claims, but on the fact that only economic rights were involved, a limitation on section 1983 that this Court subsequently rejected in *Lynch*. 405 U.S. at 538.

[25] Although in this case the result of this statutory theory is the same as under the Supremacy theory discussed in section A *supra*, the argument made here is broader than the Supremacy theory. This is because not all violations of federal statutes by persons acting under color of state law involve the supremacy of federal over state law; but all such violations would be covered by the

415 U.S. 651, 675 (1974) ("It is, of course, true that . . . suits in federal court under section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States"); *see also*, 415 U.S. at 679, 690-91 (Douglas, J. and Marshall, J. dissenting). It remains only to show that jurisdiction over statutory claims brought under section 1983 exists under 28 U.S.C. § 1343(3).

Section 1 of the Civil Rights Act of 1871 provided concurrent jurisdiction in both the federal district and circuit courts for all civil actions arising under its substantive provisions.[26] When the substantive and jurisdictional provisions were divided by the Revisors in 1875, district court jurisdiction continued to parallel the substantive provision, including coverage of rights secured by all laws of the United States. Rev. Stat. § 563(12).[27] Circuit court juris-

"and laws" language of the statute. For this reason, addition of the "and laws" language by the Revisors in 1875 was not redundant with the pre-existing coverage of Supremacy claims under the original 1871 Act.

[26] Section 1 of the 1871 Act provided:

> Any person, who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proceeding . . . to be prosecuted in the several district or circuit courts . . . under the provisions of the act of the ninth of April, eighteen hundred and sixty-six . . .

17 Stat. 13.

[27] Section 563(12) provided:

> The district courts shall have jurisdiction as follows . . . Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under

diction, however, was limited to actions to redress the violation of Constitutional rights or rights secured by "any law providing for equal rights." Rev. Stat. § 629(16).[28] Finally, when the Judicial Code was revised again in 1911, the circuit court language in section 629(16), rather than the district court language in section 563(12), was used in the single district court jurisdictional provision, now 28 U.S.C. § 1343(3), that was enacted. Act of March 3, 1911, ch. 231, 36 Stat. 1087.[28a]

Nothing in this history suggests that, despite the difference in language, section 1343(3) is more narrow in

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color of any law . . . of any State, of any right, privilege, or immunity secured by the Constitution of the United States or of any right secured by any law of the United States to persons within the jurisdiction thereof.

[28] Section 629(16) provided:

The circuit courts shall have original jurisdiction as follows . . . Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation under color of law . . . of any State, of any right, privilege, or immunity, secured by the Constitution of the United States or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

[28a] Original federal question jurisdiction was given the federal courts in 1875, Act of March 3, 1875, 18 Stat. 470, the same year in which the predecessor of section 1983 was enlarged to include state deprivations of federal statutory rights. In *Lynch* v. *Household Finance Corp., supra,* the Court found no indication in the legislative history that the provision of general federal question jurisdiction was intended to narrow the scope of the 1871 Civil Rights Act, particularly noting the simultaneous expansion of section 1983. 405 U.S. at 548 and n.15. The Court further noted that when Congress increased the amount in controversy requirement in 1911 (to $3000), 36 Stat. 1091, "there was no indication that jurisdiction under what is now §1343(3) was to be reduced," and indeed Congress had "explicitly preserved the exemption" for §1343(3)'s predecessor. *Id. See also* S. Rep. No. 388, 61st Cong., 2nd Sess., pt. 1, p. 11 (1910).

scope than section 1983 when federal statutory rights are involved. Rather, for the following reasons, respondents submit that section 1983 is itself an "Act of Congress providing for equal rights," so that any action brought under it falls within the scope of section 1343(3).

First, this Court has made clear that "the reach of the statute conferring jurisdiction [section 1343(3)] should be construed in light of the cause of action [section 1983] as to which federal judicial power *has* been extended by Congress." *Aldinger* v. *Howard, supra,* 427 U.S. at 17 (emphasis in original). *See also, Examining Board of Engineers, Architects & Surveyors* v. *De Otero, supra.* Prior to the 1875 Revision, Congress had provided federal jurisdiction for all actions under section 1983. *See* note 26 *supra.* Furthermore, the same jurisdiction existed concurrently in both the district and circuit courts. *Id.* Without clear contrary evidence in the legislative history, the jurisdictional provisions enacted by the Revisors should not be interpreted to alter this scheme. Rather, Rev. Stat. § 629(16) should be interpreted as having continued to provide the same civil rights jurisdiction for the circuit courts as Rev. Stat. § 563(12) provided for the district courts—that is, jurisdiction over actions to redress violations of the Constitution and *all* laws.

Second, the legislative history supports the view that Rev. Stat. §§ 629(16) and 563(12) were both intended to provide jurisdiction over all claims brought under section 1983. Thus, the Revisors' marginal notes to both sections described them identically as pertaining to "suits to redress deprivation of rights secured by the Constitution and laws," and both provisions were cross-referenced by the Revisors to sections 1977 and 1979 of the Revised

Statutes (now 42 U.S.C. §§ 1981 and 1983). Rev. Stat. §§ 563(12), 629(16). Similarly, Revised Statutes § 1979 (now 42 U.S.C. § 1983) was cross-referenced to *both* jurisdictional provisions. *Id.*

This view is confirmed by the following explanatory note concerning § 629(16) that appeared in an early draft of the Revised Statutes:

> It may have been the intention of Congress to provide by this enactment [referring to section 1 of the 1871 Act], for all the cases of deprivations mentioned in the previous act of 1870, and thus actually to supersede the indefinite provision contained in that act. But as it might perhaps be held that only such rights as are specifically secured by the Constitution and not every right secured by a law authorized by the Constitution were here [referring to section 629(16)] intended, it is deemed safer to add a reference to the civil rights act.

1 Revision of U.S. Statutes, Title 13, p. 64 (1872). This note makes clear that the phrase "any law providing for equal rights" in § 629(16) was intended as a shorthand reference for the revised version of section 1 of the 1871 Civil Rights Act. Rev. Stat. § 1979. This is true because, with the addition of "and laws," *see* p. 25, *supra*, Rev. Stat. § 1979 was the only "civil rights act" that provided a civil action to redress violations of "every right secured by a law authorized by the Constitution," and because, as the passage demonstrates the Revisors regarded the 1871 Act as having superseded earlier civil rights laws.

Third, the origin of the 1871 Act as an Act to enforce the Fourteenth Amendment strongly suggests that it is

an "Act . . . providing for equal rights," even where it embraces rights created by statutes that do not speak specifically in terms of equality.[29] It was "the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum behind [the 1871 Act]." *Monroe* v. *Pape, supra*, 365 U.S. at 174-75.

Finally, the legislative history of the 1911 revision indicates that Congress intended to merge into a single section, now codified as 28 U.S.C. § 1343(3), the jurisdiction previously divided between the circuit and district courts:

> This paragraph merges the jurisdiction now vested in the district courts by paragraph 12 of section 563, and in the circuit courts by paragraph 16 of section 629, and vests it in the district courts.

S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1 at 15 (1910). Therefore, assuming *arguendo* that section 629(16) did not originally provide jurisdiction over all cases arising under section 1983, it is clear that section 563(12) did provide jurisdiction over all 1983 claims,[30] and this jurisdiction was merged into present section 1343(3).

The states do not attempt to argue that section 1343(3) is more narrow than section 1983. Instead, they contend that section 1983 as amended by the Revisors was never

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[29] Congress could well have determined that in order to guarantee equality of opportunity and secure equal treatment for all persons as intended by the Fourteenth Amendment it was necessary to provide a right of action in federal court to enforce both constitutional and statutory rights. *Cf. Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

[30] Any other conclusion would ignore the Revisors' reference to Rev. Stat. § 1979, and would mean there was no jurisdictional counterpart for section 1983 in the Revised Statutes.

intended to apply to laws other than civil rights laws that speak in terms of racial equality, and that both section 1983 and section 1343(3) should be so limited. The only possible support for this argument is the decision in *Georgia* v. *Rachel,* 384 U.S. 780 (1960), which is clearly distinguishable.

In *Rachel,* this Court construed the phrase "law providing for equal civil rights" in the civil rights removal statute, 28 U.S.C. § 1443(1), to mean any law "providing for specific civil rights stated in terms of racial equality," but not including section 1983. 384 U.S. at 792. Section 1443(1) was derived from section 3 of the Civil Rights Act of 1866, 14 Stat. 27, which provided for removal only in cases involving the express rights of racial equality guaranteed in section 1 of that Act. 384 U.S. at 790. The 1866 Act was adopted to enforce the Thirteenth Amendment and was focused entirely on removing the badges of slavery outlawed by that Amendment. *See Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 439-40 (1968). These origins strongly suggested that removal should not be available where nonracial rights were at stake. 384 U.S. at 789-92.

Since the 1871 Act contained no authorization for removal jurisdiction, the Court in *Rachel* reasoned that the Revisors could not have intended the phrase "equal civil rights" in section 1443(1) to create removal jurisdiction in cases protected by section 1983. 384 U.S. at 790. In addition, there were strong policy reasons for construing section 1443(1) narrowly.[31]

[31] Because removal divests state courts of jurisdiction to act in a particular case, it eliminates the role of the state courts as partners in enforcing constitutional rights. In addition, since removal applies to criminal as well as civil cases, section 1443(1) runs counter to the general policy against federal judicial interference in state criminal administration. *See, e.g., Douglas* v. *City of Jeannette,* 319 U.S. 157 (1943); *Younger* v. *Harris,* 401 U.S. 37 (1971). Removal jurisdiction also encourages the unnecessary decision of federal constitutional questions, where cases could be resolved in the state courts on state law grounds, and it involves the federal courts in issues of state law that are incidental to the state court action.

In contrast to section 1443(1), section 1983 involves no interference with state criminal administration. Furthermore, the state courts have never been regarded as having an important role in the development of federal statutory programs such as those under the Social Security Act. There are, therefore, no reasons such as there were in *Rachel,* to construe the language of section 1343(3) narrowly.

None of these factors are present here. Section 1983 clearly reaches deprivations of Constitutional rights other than those cast in racial terms. *Monroe* v. *Pape, supra,* 365 U.S. at 80-83, and there is no evidence that Congress meant to limit the statutory rights covered by the Act more narrowly than the Constitutional rights that are covered. If Congress had intended section 1983 to provide a remedy only for laws that speak in racial terms, it is not likely that it would have used the broad term "laws". As the explanatory note quoted earlier demonstrates, the Revisors interpreted Rev. Stat. § 1979 as applying to all laws authorized by the Constitution which is far more consistent with the statutory language than the states' construction. Finally, as we discuss in Part I, section D *infra,* there are strong policy reasons for construing the language of section 1343 (3) broadly.

In sum, claims under the Social Security Act are secured by the "laws" of the United States so as to give rise to a cause of action under section 1983. Jurisdiction over such 1983 claims exists under section 1343(3), since the history of section 1983 and section 1343(3) makes clear that it is an Act of Congress providing for equal rights.

C. *Jurisdiction Over Respondents' Social Security Act Claims Also Exists Under 28 U.S.C. § 1343(4).*

The Court of Appeals in this case found jurisdiction over respondents' claims under 28 U.S.C. § 1343(4), which provides jurisdiction in the district courts over any civil action authorized by law "to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." App. to Petition for Writ of Certiorari, B-30. In sections A and B of this Part, respondents have shown that their rights under the Social Security Act may be protected by an action brought under section 1983. In this section, we show that the Court of Appeals correctly found that section 1983 is an Act of Congress providing for the protection of civil rights within the meaning of section 1343(4).

There can be no question that section 1983 *protects* federally created constitutional and statutory rights by providing civil remedies for their deprivation at the hands of state and local officials:

> [The] legislative history [of section 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the *protection* of federally created rights; it was concerned that state instrumentalities could not *protect* those rights; it realized that state officers might, in fact, be antipathetic to the *vindication* of those rights; and it believed that these failings extended to the state courts.

Mitchum v. *Foster, supra,* 407 U.S. at 242 (emphasis supplied). Furthermore, the rights protected by section 1983 are "civil rights." In *Moor* v. *County of Alameda,* 411 U.S.

693 (1973), this Court noted that section 1983 is one of the "various acts . . . which do create federal causes of action for the violation of federal civil rights." 411 U.S. at 702. In *Robertson* v. *Wegmann,* 46 U.S.L.W. 4555, 4557 (May 31, 1978), the Court referred to section 1983 as "one of the 'Reconstruction civil rights statutes,'"[31a] and in *Monell* v. *New York City Dept. of Social Services, supra,* 46 U.S.L.W. at 4576-77, the Court stated that the legislative history makes clear that section 1983 was "intended to give a broad remedy for violations of federally protected rights."

In *Jones* v. *Alfred H. Mayer Co., supra,* this Court held that jurisdiction exists under section 1343(4) to decide a case arising under 42 U.S.C. § 1982 without regard to the amount in controversy. 302 U.S. at 412 n. 1. As has been noted previously, section 1983 was enacted to enforce the Fourteenth Amendment, which in turn was intended *inter alia* to make permanent the civil rights previously protected in section 1982 and the other portions of the Civil Rights Act of 1866, *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 544-45; *Shelley* v. *Kraemer,* 334 U.S. 1, 10-11 (1948). Furthermore, section 1983 was expressly modeled after section 2 of the 1866 Act, *Mitchum* v. *Foster, supra,* 407 U.S. at 239; *Lynch* v. *Household Finance Corp. supra,* 405 U.S. at 545 n. 2; *Monroe* v. *Pape, supra,* 365 U.S. at 185, which provided criminal penalties for violating the civil rights protected in section 1 of that Act (now section 1982). Although section 1983 is much broader than section 1982, particularly as it protects non-racial rights, the two

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[31a] Petitioners suggest that there is no basis for federal jurisdiction since the Fifth Circuit's decision rested on a federal regulation, 45 C.F.R. §233.90(a), rather than a federal statute. Petitioners' Brief at 12. This argument is frivolous, since the federal regulation clearly implements and enforces the requirements of 42 U.S.C. §602(a)(7). *See e.g., Lewis* v. *Martin,* 397 U.S. 552, 555-58 (1970).

statutes thus had common purposes and should not be treated differently under section 1343(4).

It is true, as the states argue, that, unlike section 1982, section 1983 does not define the substantive rights that fall within its protection. But section 1343(4) applies to Acts that *protect* civil rights, not to Acts that *create* rights. Moreover, other provisions of the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, of which section 1343(4) was a part, demonstrate that Congress in 1957 was unconcerned whether a civil rights law defined its own rights or, instead, protected rights defined by reference to the Constitution and other federal statutes. Thus, the 1957 Act authorized the creation of a Civil Rights Division within the Department of Justice to concentrate on the enforcement of the criminal civil rights statutes, 18 U.S.C. §§ 241-242, which, like section 1983, speak in terms of general Constitutional and statutory rights. Similarly, the bill originally provided a new right of action on behalf of the Attorney General to enforce the rights guaranteed by section 42 U.S.C. §§ 1985(1)-(3).[32] One of those sections, 42 U.S.C.

[32] *Jones* makes clear that section 1343(4) is not merely a technical amendment limited to enforcing substantive rights created in the Civil Rights Act of 1957, as several lower courts have held. *See Gonzalez* v. *Young*, 560 F.2d 160 (3d Cir. 1977), *cert. granted*, 98 S. Ct. 1232 (1978) (No.77-5324); *Andrews* v. *Maher*, 525 F.2d 113 (2d Cir. 1975); *Randall* v. *Goldmark*, 495 F.2d 356 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974). *But see Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974); *Gomez* v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969). Although the House Report described section 1343(4) as providing jurisdiction for a proposed new cause of action by the Attorney General to enforce 42 U.S.C. § 1985, H. Rep. No. 291, 85th Cong., 1st Sess. 9-10 (1957), this could not have been the only purpose of the jurisdictional section. First, the jurisdictional section was retained even after the cause of action was dropped from the bill in the Senate. Second, the section which authorized the new cause of action also contained its own jurisdictional provision. H.R. 6127, 85th Cong., 1st Sess. § 121 (1957). Third, if Congress wanted to limit section 1343(4) to the new public actions under section 1985 it probably would have amended sections 1343(1) and (2), which already provided jurisdiction over private actions under that section.

§ 1985(3) provides a civil right of action, similar to that in section 1983, against persons who conspire to deprive any person or class of persons "of the equal protection of the laws, or of equal privileges and immunities under the laws." *See, Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

Finally, the overall purpose of the Civil Rights Act of 1957 was "to achieve a more effective enforcement of the rights [already] guaranteed by the Constitution and laws of the United States." H.R. Rep. No. 291, 85th Cong., 1st Sess. 5 (1957). It is consistent with this purpose that section 1343(4) was enacted to eliminate questions that had arisen regarding the scope of jurisdiction under sections 1983 and 1343(3) in the area of both Constitutional rights, see *Hague* v. *C.I.O.*, *supra*, and federal statutory rights. *See, e.g.*, 66 Harv. L. Rev. 1285, 1292-93 (1958); 43 Ill. L. Rev. 105, 107-08 (1948); 47 Colum. L. Rev. 1082, 1083-84 (1947). There is also some evidence that section 1343(4) was originally drafted by the Department of Justice to provide jurisdiction for a proposed new action by the Attorney General to enforce section 1983. Anderson, *Eisenhower, Brownell, and the Congress: The Tangled Origins of the Civil Rights Bill of 1956-57*, 19 (1964). Although the amendment to section 1983 was dropped by the Department before the bill was sent to Congress, *id.* at 20, the jurisdictional section remained in the bill and should be given the scope originally intended for it.

D. *Strong Policy Considerations Support the Conclusion That Section 1343(3)-(4) Provides Federal Jurisdiction for All Federal Supremacy and Statutory Claims Brought Under Section 1983.*

The original purpose of section 1983 and its jurisdictional counterpart was to shift from the state courts to the federal courts principal responsibility for the enforcement of federal rights. It was believed that "by reason of prejudice, passion, neglect, intolerance or otherwise," *Monroe* v. *Pape, supra,* 365 U.S. at 180 (Frankfurter, J., dissenting), federal rights were no longer secure in the state courts and that "a uniquely federal remedy," *Mitchum* v. *Foster, supra,* 407 U.S. at 239, was required.

Although there is no longer the openly hostile climate of the 1860's, state courts still are subject to local pressures that often make them unwilling to enforce federally created rights, *see generally* Neuborne, *The Myth of Parity,* 90 Harv. L. Rev. 1105, 1116 n. 46, 1127-28 (1977), especially where sensitive social policies, such as those embodied in the Social Security Act, are at stake. *See, e.g. Kirkwood* v. *Winstead,* 246 So. 2d 557 (Miss.), *appeal dismissed for want of a substantial federal question,* 404 U.S. 963 (1971). State courts have neither the experience nor resources to interpret properly the complexities of the federal statutory scheme.[33] Finally and most importantly, "[i]t is . . . peculiarly part of the duty of [the federal courts], no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to

[33] As Judge Feinberg recently noted, "[t]he tangle of federal and state statutes and regulations in the welfare area now rivals the Internal Revenue Code and its attendant regulations as a marvel of complexity." *McGraw* v. *Berger,* 537 F.2d 719, 720 (2d Cir. 1976), *cert. denied,* 429 U.S. 1095 (1977).

the States are being expended in consonance with conditions that Congress has attached to their use." *Rosado* v. *Wyman, supra,* 397 U.S. at 423 (1970).

Refusal of this Court to find jurisdiction over federal welfare claims under section 1343(3) or (4) may mean that no remedy exists for their vindication.[34] Several states prohibit any review of welfare decisions in state courts; Ark. Stat. Ann. §83-135 (Repl. 1976); Miss. Code Ann. § 43-29-33 (1973), construed in *Kirkwood* v. *Winstead, supra; Bolin* v. *White,* 51 Ohio App. 2d 92, 367 N.E. 2d 63

[34] Federal jurisdiction may lie under 28 U.S.C. § 1331 where the amount in controversy exceeds $10,000. However, except for the few cases in which the right to future benefits exceeds $10,000, *see, e.g. Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 642 n. 10 (1975), or where the individual claims may be aggregated because they are "common and undivided," *see, e.g. Bass* v. *Rockefeller,* 331 F. Supp. 945, 950 (S.D.N.Y.), *vacated as moot,* 464 F.2d 1300 (2d Cir. 1971), claims such as those at stake here cannot meet the jurisdictional requirement and must be brought, if at all, in state court. *E.g., Gonzalez* v. *Young, supra,* 560 F.2d at 164; *Andrews* v. *Maher, supra,* 525 F.2d at 116; *Randall* v. *Goldmark, supra,* 495 F.2d at 360-61; *Rosado* v. *Wyman,* 414 F.2d 170, 176-77 (2d Cir. 1969), *rev'd on other grounds,* 397 U.S. 397 (1970).

The jurisdictional amount requirement was adopted to ensure that federal courts do not waste their time on the trial of petty controversies. S. Rep. No. 1830, 85th Cong., 2d Sess. 3103 (1958). Challenges to statewide welfare practices that involve millions of dollars manifestly are not petty. Furthermore, the inappropriateness of requiring any amount in controversy where federal rights are in issue has been long and consistently recognized. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 Law & Contemp. Prob. 216, 225 (1948); Friedenthal, *New Limitations on Federal Jurisdiction,* 11 Stan. L. Rev. 213, 217-18 (1959); American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts,* § 1311(a) and Commentary thereon at 172-76 (Off. Dr. 1969); *Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee,* 95th Cong., 1st Sess. 270 (Oct. 19, 1977) (Statement of Joseph F. Spaniol, Jr. on behalf of the United States Judicial Conference).

(Ct. of App. Frank. Co. 1976); Va. Code § 63.1-119 (Repl. 1973). Even where state court remedies are theoretically available they may nevertheless be so encumbered as to be virtually non-existent. *E.g.*, La. Rev. Stat. Ann. § 46:107 (D) (Supp. 1978), construed in *Hills* v. *Bonin*, 329 So. 2d 773 (La. App.), *applic. for review denied*, 333 So. 2d 237 (La. 1976) (action must be filed within 15 days of mailing fair hearing decision); Ky. Rev. Stat. Ann. § 205.234 (Repl. 1977) (verified petition for review of welfare department decision must be filed within 20 days after decision). Finally, state procedures may make it difficult if not impossible to obtain adequate relief for all persons affected without repeated litigation. *E.g.*, *Jones* v. *Berman*, 37 N.Y. 2d 42, 58, 371 N.Y.S. 2d 422, 432 (1975) (class actions not available in cases against welfare department); *People ex rel. Naughton* v. *Swank*, 58 Ill. 2d 95, 317 N.E. 2d 499 (1974); *Chicago Welfare Rights Org.* v. *Weaver*, 56 Ill. 2d 33, 305 N.E. 2d 140 (1973), *appeal dismissed cert. denied*, 417 U.S. 962 (1974) (each plaintiff must exhaust state administrative remedies even where state law is challenged on Constitutional or federal statutory grounds); *see also Vickers* v. *Trainor*, 546 F.2d 739 (7th Cir. 1976).

Inclusion of federal Supremacy claims under section 1343(3) will not add significantly to the caseload of the federal courts.[35] Jurisdiction already exists over most fed-

[35] In a statement submitted to the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, Professor Charles Alan Wright recently estimated that the number of cases that would be added to the federal dockets by the abolition of the amount in controversy requirement in *all* federal question cases "must [surely] be a very small one." *Hearings*, *supra*, note 34, at 263. The Assistant Director of the Administrative Office of the United States Courts testified on behalf of the Judicial Conference of the United States that the number of cases involving a federal question that are not covered by a specific statutory authorization is so small that they are not separately classified in the statistical system for reporting cases filed in the district courts. *Id.* at 270. He consequently concluded that total elimination of the amount requirement would not have "any appreciable impact on the caseloads of the district courts." *Id.* The number of cases added by the rule urged by respondents in this case would be even smaller than the proposal which Professor Wright and Mr. Spaniol were addressing.

eral statutory claims without regard to the amount in controversy. *Lynch* v. *Household Finance Corp.*, *supra*, 405 U.S. at 549 n. 17; Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction § 3701 (1976). Moreover, coverage of Supremacy claims directly would reduce the time and effort now spent in many welfare and related cases that rely on pendent Constitutional claims. Under this approach experience has shown that considerable judicial resources are often wasted on questions of jurisdiction although the underlying statutory issues are straightforward. *See Andrews* v. *Maher*, *supra*, 525 F.2d at 120; *Aguayo* v. *Richardson*, 473 F.2d 1090, 1098 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Almenares* v. *Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972), discussed in Friendly, *Federal Jurisdiction: A General View* 123 (1973).

Finally, the history of Pub. L. No. 94-574, 90 Stat. 2721, which eliminated the amount in controversy requirement for some, but not all, federal question cases does not reflect any Congressional intent to limit jurisdiction over federal welfare claims against state officials.[36] *Cf. Califano*

[36] There is in fact evidence that Congress in 1976 believed that federal statutory claims could be brought under section 1983. The Civil Rights Attorney's Fee Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, provides for the award of attorney's fees and other

v. *Sanders*, 430 U.S. 99 (1977). As introduced in the Senate, the bill originally removed the amount in controversy requirement in all federal question cases. S. 800, 94th Cong., 1st Sess. § 2 (1976). Although the Senate Judiciary Committee limited the provision to cases involving federal defendants, S. Rep. No. 94-996, 94th Cong., 2d Sess. 14 (1976), the Committee expressly stated, that its action was not intended as a rejection of broader legislation. *Id.* Furthermore, even if Congress had expressly rejected removing the jurisdictional amount requirement in all federal cases, this would not have indicated its attitude regarding the more narrow question presented here of federal jurisdiction in cases against state officials.[37]

In sum, federal Supremacy claims are highly appropriate for resolution in the federal courts, alternative state forums may often be unavailable, and there are no reasons of judicial economy for precluding jurisdiction. The Court

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litigation expenses to the prevailing party in any action brought under section 1983. During the debates on the Attorney's Fees Act which occurred in the Senate shortly after the debate on Pub. L. No. 94-574 and in the House on the same day as the debate on Pub. L. No. 94-574, a number of members of Congress made clear their understanding that section 1983 reaches federal statutory claims. 122 Cong. Rec. S17052-53 (daily ed. Sept. 29, 1976); 122 Cong. Rec. H12159 (daily ed. Oct. 1, 1976).

[37] Legislation to eliminate the amount in controversy requirement in all federal question cases passed the House of Representatives on February 28, 1978, 124 Cong. Rec. H1569-70 (daily ed.); H.R. 9622, 95th Cong., 1st Sess. (1977), and has been introduced in the Senate. S. 2389, 95th Cong., 1st Sess. (1977). Contrary to the states' suggestion, nothing in the House Report for H.R. 9622 indicates that Congress believes that jurisdiction over welfare claims does not or should not exist under sections 1343(3) or (4). Rather, the Report merely recognizes that the question is unsettled. H.R. Rep. No. 95-893, 95th Cong., 2d Sess. 19 (1978).

should therefore hold that federal welfare rights may be enforced in federal courts under section 1983 and sections 1343(3) or 1343(4).

II. Texas may not perpetuate prior unlawfully reduced standards and thereby obscure the extent to which its AFDC program falls short of fulfilling actual need.

Once the Court resolves the jurisdictional issues discussed above, it reaches the relatively easy question on the merits—does section 402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23), permit Texas to continue to rely upon AFDC shelter and utilities allowances which have been reduced by means which violate federal law? In section 402(a)(23), added by the Social Security Act Amendments of 1967, 81 Stat. 898, Congress provided, to the extent relevant here, that by July 1, 1969:

> the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established . . . . section 402(a)(23).

A primary purpose of the one-time cost-of-living increase in needs standards mandated by section 402(a)(23) was to force each state to disclose the "true extent to which actual assistance falls short of the minimum acceptable." *Rosado* v. *Wyman, supra*, 397 U.S. at 413. As *Rosado* held, each state had to make and maintain this one-time increase in its needs standards. The state could avoid increases in payments or even lower payments by applying a percentage factor to the increased standard, but it could not redefine its standards in such a way that the state was circumnavi-

gating the updating requirement and thereby avoiding "the consequences of increasing the numbers of those eligible and facing up to the failure to allocate sufficient funds to provide for them." *Rosado* v. *Wyman, supra,* 397 U.S. at 413, 415.

In 1969 Texas increased its standards, including its maximum shelter allowances, by an 11% cost-of-living factor in order to comply with section 402(a)(23). Although these standards had been updated, and the validity of that updating is not questioned in this case, some of those standards were unlawful prorated allowances, as we will discuss below. We shall then show that when Texas consolidated its standards in 1973 by averaging together full and prorated allowances, it perpetuated the effect of its previous violations of law and, in doing so, violated section 402(a)(23) by failing to show the extent to which its benefits fall short of its lawful 1969 standards.

A. *The Pre-1973 Texas Prorating Policy Was an Unauthorized Assumption of Income.*

The pre-1973 Texas prorating policy resulted in a reduction in the shelter allowance, and therefore in the AFDC benefit, whenever a non-dependent non-contributing relative lived in the home. Thus, when a penniless relative moved into the house of AFDC recipients, Texas determined that the family would receive less money, even if in fact it had had no increase in income or decrease in shelter costs. This Court has held that such an automatic reduction of the shelter allowance was an assumption that income was available to the family, and that such an assumption contrary to fact violates the fundamental requirement in the AFDC program that only currently and actually available income

be considered in determining need. *Van Lare* v. *Hurley, supra,* relying upon *King* v. *Smith, supra; Lewis* v. *Martin,* 397 U.S. 552 (1970); section 402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7); and 45 C.F.R. §§233.20(a)(3)(ii)(D), 233.90(a).[38]

The holding in *Van Lare* v. *Hurley, supra,* clearly applies to the facts of this case, as is confirmed by a comparison of the application of the New York and Texas prorating policies to similar plaintiff families in the two states. In both *Van Lare* and the instant case there was a family consisting of a mother, her child, a disabled adult sister, and, in Texas, a grandmother as well. In both cases the family had no income other than public assistance, and in both cases only the mother and child qualified for AFDC benefits. And most relevant here, both of these families received benefits computed on the basis of a reduced shelter allowance which was a proportionate share of the standard for a household size which included the ineligible relatives. In both states their shelter allowance, and therefore their

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[38] Any other conclusion in *Van Lare* would have enabled states to avoid the full impact of the regulation sustained in *Lewis* v. *Martin, supra,* which forbade any consideration of the income of a stepparent or man assuming the role of a spouse (MARS) unless such income was actually being contributed. If a state could simply have assumed the income of the stepparent or MARS (whether such income existed or not) to be available in an amount equal to a pro rata share of the shelter allowance, and the grant could accordingly have been reduced, the HEW regulation would have been gutted. See *Taylor* v. *Lavine,* 497 F.2d 1208, 1217 (2d Cir. 1974) (Oakes, C.J. dissenting), *reversed, Van Lare* v. *Hurley, supra.*

actual benefits, would have increased if the destitute relatives had left the house.[39]

Texas argues that *Van Lare* v. *Hurley, supra,* is distinguishable, however, in that the New York policy was an assumption of income and the Texas policy which achieved the identical result was not. Unfortunately for Texas, New York had also attempted to avoid the decision reached in *Van Lare* by arguing that its policy was not an assumption of income. Thus New York described its prorating policy as a simple determination of household shelter allowances on a per capita basis, with the allowances of those members of the household who were AFDC recipients added together to determine the AFDC benefit. It explicitly and repeatedly denied that it was presuming any income to the AFDC

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[39] The shelter standards were computed as follows:

	Texas (Ortega)	*New York* (Taylor)
AFDC family	Mother, child	Mother, child
Others in household	disabled sister, mother	disabled sister
Actual shelter cost	$51	$180
Maximum shelter standard for mother and child	$33	$145
Maximum shelter standard for the full household (size of household)	$44(4)	$165(3)
Prorated shelter standard used	2/4 × $44 = $22	2/3 × $165 = $110
Actual non-public assistance income of any member of the household	$0	$0

See statements of facts in Brief for Appellants in *Van Lare* v. *Hurley,* No. 74-453, at 13-14.

family.[40] In addition, New York relied upon the Second Circuit's acceptance of its argument, now Texas' argument, in *Taylor* v. *Lavine, supra,* 497 F.2d at 1215-1216. Nonetheless, this Court reversed *Taylor* and held that the prorating regulations were "based on the assumption that the nonpaying lodger is contributing to the welfare household, without inquiring into whether he in fact does so." *Van Lare* v. *Hurley, supra,* 421 U.S. at 346.

Perhaps aware that its argument had been pressed by New York and rejected by this Court, Texas attempts to show that New York was not entitled to the argument. Thus Texas claims that the New York regulations operated differently from the Texas regulations in that New York, unlike Texas, ascertained the actual income of the non-recipient and then automatically assumed that a portion of that income was available to the family whether it had been made available or not. Petitioners' Brief at 13-14. This characterization of New York's policy is plainly incorrect. New York only applied the prorating policy after finding that the non-recipient had in fact contributed nothing, or less than $15, upon which it assumed that the non-recipient contributed a pro rata share of the shelter cost whether or not he had income and regardless of the amount of that income. Indeed, New York explicitly advised the Court, and the Court agreed, that assuming that the actual income of

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[40] The New York prorating regulation "makes no assumption of support or 'contribution' by the lodger to the recipients but merely distinguishes the shelter needs of one from the other in order to meet only the recipients' needs from public funds." Brief for Appellants in *Van Lare* v. *Hurley,* No. 74-453 (1974 Term), *supra,* at 41-42. For New York's repeated insistence that its prorating policy was a determination of need, not an assumption of income, see the aforementioned brief throughout and the Reply Brief for Appellants in *Van Lare* v. *Hurley, supra,* at 1-7.

the non-recipient was available to the recipient would undermine the regulation sustained in *Lewis* v. *Martin, supra.*[41] Brief of Appellants in *Van Lare* v. *Hurley, supra; Van Lare* v. *Hurley, supra,* 421 U.S. at 347.

When HEW amended its regulations to implement *Van Lare* v. *Hurley, supra,* it certainly understood that that decision addressed the prior Texas policy. Thus, the agency amended the portion of its regulations concerning standards of assistance, 45 C.F.R. §233.20(a)(2) (not the section on "income and resources", 45 C.F.R. §233.20(a)(3)) to read as follows:

> Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit. 45 C.F.R. §233.20(a)(2)(viii); 42 Fed. Reg. 6583-4 (Feb. 3, 1977).

Since Texas prorated the shelter and utility allowances solely because of the presence of a non-legally responsible relative in the house, it assumed income in violation of

[41] Texas did not have a special rule as New York did for treatment of contributions above and below $15, but the arguments to the Court and the decision in *Van Lare* did not turn upon that feature of the New York policy, and, as shown above, the basic prorating policy achieved identical results in New York and Texas. The Texas prorating policy contained one feature not considered by this Court in *Van Lare*. Under the Texas policy, AFDC recipients living in the home of non-recipients also had their grants based upon a prorata shelter allowance. The validity of that provision is not at issue, since the Fifth Circuit found for petitioner on that issue and respondent chose not to pursue that claim.

section 402(a)(7) of the Social Security Act and therefore unlawfully reduced that standard.

B. *Texas Has Impermissibly Reduced Its Needs Standards Below 1969 Levels in Violation of Section 402(a)(23) of the Social Security Act.*

While states were required to make a one-time increase in needs standards by July 1, 1969 pursuant to section 402(a)(23) of the Social Security Act, they were not locked into any particular structure of needs standards. Thus states like New York and Texas could move from individualized standards based upon age of children and separate standards for different needs to consolidated standards for all families of a certain size. It was critical, however, that the new standards not obscure the extent to which actual benefit payments failed to meet needs standards fully reflecting the one-time increase in the cost-of-living. The Supreme Court therefore held that the states, in making such consolidations, had to assure that "all factors in the old equation are accounted for and fairly priced" and that "the consolidation on a statistical basis reflects a fair averaging." *Rosado* v. *Wyman, supra,* 397 U.S. at 419.[42]

The issue in this case is whether a state satisfies section 402(a)(23) by averaging together shelter allowances that were lower than federal law permits, even though they had been increased to 1969 levels. Texas consolidated its standards by averaging together all individualized stan-

[42] A state would have much more flexibility if it had increased its standards above the up-dated level required by section 402(a)(23) and now wishes to restructure and reduce standards. That issue does not arise here, however, since the standards Texas restructured were those adopted in order to comply with section 402(a)(23) and only reflect 1969 cost-of-living levels.

dards from four months in 1971 and 1972, including shelter and utility allowances that had been reduced by its unlawful prorating policy. Since the prorated allowances were unlawfully reduced, they understated the need for shelter and therefore obscured the true standard. Thus respondent Ortega, whose shelter allowance would have been $33 if the unlawful prorating policy had not been applied, received a grant based upon a shelter allowance of only $22. By including this reduced figure in the averages to create new standards for all families, Texas developed standards which understated or concealed the true need of all recipients.

We submit that such an averaging fails to satisfy section 402(a)(23), for the prior prorated shelter and utilities allowances were not "fairly priced," but, as *Van Lare* held, unfairly priced. They therefore failed to reveal the extent to which the benefits paid by Texas in 1971 and 1972 had failed to meet needs under the true 1969 standards.[43] Texas has therefore been able to maintain that it continues to provide payments equal to 75% of 1969 need levels, whereas a fairly priced standard would show that Texas is in fact paying significantly less than 75% of those levels. If Texas is not required to adjust its standards now, it will be able to continue to avoid the current consequence intended by section 402(a)(23) simply because its past illegality was not challenged.[44]

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[43] The failure to include the full shelter allowance in the averaging process is no different from omitting certain items of need in the consolidation. This Court has held that New York could not lower its standard of need by eliminating items that had previously been provided. *Rosado* v. *Wyman, supra,* 397 U.S. at 416. Similarly Texas cannot refuse to include needs which it had identified but then unlawfully chose not to consider.

[44] *Rosado* involved a consolidation of personal needs items, but not shelter. If New York now chose to consolidate its shelter

The invalidity of using prorated allowances in calculating a consolidated standard under section 402(a)(23) posed no difficulty to the court below or to the two Courts of Appeals which had previously considered that or a similar question. The Second Circuit, for example, had to decide many issues concerning the extent to which Connecticut had complied with section 402(a)(23) when it consolidated its standards, and it determined that the precise issue in the instant case, whether former prorated standards could be included in averaging to reach a new consolidated average, was "the easiest" issue of all. Since the Court found the former Connecticut prorating scheme invalid under *Van Lare* v. *Hurley, supra,* it held that section 402(a)(23) "does not permit continuation of an unlawful scheme simply because it was updated" and remanded the case for upward adjustment of the standard. *Johnson* v. *White,* 528 F.2d 1228, 1236-37 (2d Cir. 1975).

The First Circuit had to resolve a similar issue when Rhode Island constructed its new standard on the basis of prior standards which had been unlawfully reduced because income from non-related men living in the home had been assumed available to the family in violation of the Social Security Act, *see Lewis* v. *Martin, supra.* The Court concluded that section 402(a)(23) precluded the state from basing its new needs level on the former unlawfully reduced levels.[45] *Roselli* v. *Affleck,* 508 F.2d 1277 (1st Cir. 1974).

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standards, it could not use its former prorated standards since they have been eliminated by *Van Lare.* There is no reason for Texas to have an advantage over New York in its ability to avoid the consequences of section 402(a)(23).

[45] Similarly, section 402(a)(23) barred Illinois from consolidating prorated standards into its new shelter allowance if those standards were based upon an assumption of income, but not if

Texas' only argument addressed to section 402(a)(23) is that the correctness of its 1972 standards was sustained in *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). Petitioners' Brief at 11. Yet that decision, and the briefs in that case of the parties and of the United States as *amicus*, were concerned only with whether countable income could be subtracted from a percentage reduced payment standard that was less than the updated need standard. Prorating was not raised, perhaps because none of the named plaintiffs in that case alleged that they had shelter allowances that had been prorated. *Jefferson* v. *Hackney, supra*, No. 70-5064, App. 17-18. Moreover, *Jefferson* was litigated before the implementation of the averaging complained of herein, so that the allowances for the named plaintiffs had not been lowered as the result of the consolidation. The validity of including prorated allowances in the average was therefore not before the Court.

In sum, Texas has obscured its true needs standards and has therefore avoided the political consequences that would flow from the revelation that it is meeting an even smaller proportion of its 1969 standards than it is acknowledging. The Texas standards must therefore be revised to comply with the requirements of section 402(a)(23).

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those standards reflected actual contributions from the non-recipients living in the household. *Illinois Welfare Rights Org.* v. *Trainor*, 438 F. Supp. 269 (N.D. Ill. 1977). This issue did not arise in *New Jersey Welfare Rights Org.* v. *Cahill*, 349 F. Supp. 501, 505 (D.N.J. 1972), *aff'd*, 483 F.2d 723 (3d Cir. 1973), since New Jersey excluded from its average all families whose standards had been reduced because there were persons in the household who were not receiving public assistance. The District Court did conclude in addressing another issue that the *Rosado* fair pricing requirement would be violated if the average included needs amounts for families that were below the appropriate level. 349 F. Supp. at 512.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals both as to jurisdiction and to the merits of respondents' claim.[46]

Respectfully submitted,

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[46] After the district court's memorandum and opinion was filed on February 11, 1975, but prior to entry of judgment, respondents filed a motion, pursuant to Rules 15 and 52(b) of the Federal Rules of Civil Procedure, to reopen the opinion of the court and for leave to file an amended complaint raising due process claims that they previously raised in response to the state's motion for summary judgment. App. A-15. The court's final judgment against respondents was entered on April 15, 1975. Thereafter, respondents filed a second motion, pursuant to Rules 15, 52(b) and 59(e), to modify the judgment and for leave to file an amended complaint containing their due process allegations. App.

A-16. Both of respondents' motions to amend were denied by the district court on May 9, 1975.

In their notice of appeal to the Court of Appeals for the Fifth Circuit, respondents specifically challenged the district court's failure to permit them to amend their complaint to plead their due process claims. R. 320. The Court of Appeals, however, had no reason to reach this question because it found jurisdiction under 28 U.S.C. § 1343(4) and it granted respondents' claims under the Social Security Act.

Rule 15(a) of the Federal Rules of Civil Procedure establishes a liberal standard for the amendment of pleadings, and a district court's denial of leave to amend is subject to review for abuse of discretion. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-32 (1971); *Foman* v. *Davis*, 371 U.S. 173, 182 (1962). Furthermore, 28 U.S.C. §1653 provides that "defective allegations of jurisdiction may be amended . . . in the trial or appellate courts." Since the due process claims that respondents sought to raise may have had an impact on the jurisdiction of the district court, they should have been permitted to amend their complaint both prior to and after judgment. *See Harkless* v. *Sweeney Ind. School Dist.*, 554 F.2d 1353, 1359 (5th Cir.), *cert. denied*, 98 S. Ct. 507-08 (1977); *Singleton* v. *Vance Cy. Bd. of Ed.*, 501 F.2d 429 (4th Cir. 1974); *Lidie* v. *State of California*, 478 F.2d 552 (9th Cir. 1973).

If this Court determines that there is no subject matter jurisdiction over respondents' statutory claims, or if it finds jurisdiction but rules against respondents on the merits, it should remand to the Court of Appeals for consideration of whether respondents' motions to amend should have been granted. Alternatively, it should remand for consideration of alternative jurisdictional grounds under 28 U.S.C. §1331 or §1337.